UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANGELICA ULLOA,	:	
Plaintiff,	:	13 Civ. 4518 (ER)(HBP)
-against-	:	REPORT AND RECOMMENDATION
CAROLYN W. COLVIN, acting Commissioner of Social Security,	:	
Defendant.	:	

PITMAN, United States Magistrate Judge:

TO THE HONORABLE EDGARDO RAMOS, United States District Judge,

I. Introduction

Plaintiff, Angelica Ulloa, brings this action pursuant to Section 205(g) of the Social Security Act (the "Act"), 42 U.S.C. § 405(g), seeking judicial review of a final decision of the Commissioner of Social Security ("Commissioner") denying her application for disability insurance benefits ("DIB") and supplemental security income ("SSI"). The Commissioner has moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure (Notice of Motion, dated December 6, 2013 (Docket Item 12)). Plaintiff has filed a cross-motion also

seeking judgment on the pleadings (Notice of Motion, dated March 10, 2014 (Docket Item 22)).

For the reasons set forth below, I respectfully recommend that plaintiff's motion be granted to the extent of remanding plaintiff's case for further proceedings consistent with this report and recommendation and that the Commissioner's motion be denied in all respects.

II. Facts

A. Procedural Background

Plaintiff filed an application for DIB and SSI on February 22, 2011 alleging that she had been disabled since January 1, 2009 (Tr.[1] 89, 91, 96). Plaintiff alleges she was disabled due to depression, post-traumatic stress disorder ("PTSD") and insomnia (Tr. 163). The Social Security Administration ("SSA") denied plaintiff's application, finding that she was not disabled (Tr. 52, 60). Plaintiff timely requested and was granted a hearing before an Administrative Law Judge ("ALJ") (see Tr. 25, 27). ALJ Gitel Reich conducted a hearing on January 3,

[1] "Tr." refers to the administrative record that the Commissioner filed with her answer, pursuant to 42 U.S.C. § 405(g) (see Notice of Filing of Administrative Record, dated August 9, 2013 (Docket Item 11)).

2012 (Tr. 27-47). In a decision dated January 30, 2012, ALJ Reich determined that plaintiff was not disabled within the meaning of the Act (Tr. 12-21). On April 4, 2012, plaintiff requested review by the Appeals Council (Tr. 6). The ALJ's decision became the final decision of the Commissioner on April 23, 2013 when the Appeals Council denied plaintiff's request for review (Tr. 1-5).

Plaintiff commenced this action seeking review of the Commissioner's decision on June 26, 2013 (Complaint (Docket Item 2)). On December 6, 2013, the Commissioner moved for judgment on the pleadings (Docket Item 12), and on March 11, 2014 plaintiff cross-moved for judgment on the pleadings (Docket Item 22).

B. Plaintiff's Social Background

Plaintiff was born June 8, 1972 and was 36 years old at the alleged disability onset date (Tr. 20). She holds a General Educational Development diploma and speaks English (Tr. 20, 164). She was employed as an office manager at a landscaping business from February 2000 through April 2009 (Tr. 31), and she held a position as office manager for a real estate law firm for a few months in 1998 (Tr. 164). Plaintiff's work for the landscaping business required her to manage forty-five people and to lift

objects weighing twenty to fifty pounds (Tr. 155). She testified that the job required her to sit for about two hours per day, and during the remaining seven hours of her work day she either walked or stood (Tr. 31-32).

According to a Function Report completed by plaintiff's SSI case manager on February 7, 2011 (Tr. 112-19), at that time, plaintiff lived with her mother, and she described her typical day as consisting of morning ablutions, making herself breakfast and then watching television, unless she had an appointment scheduled (see Tr. 112, 114). She reported spending the day in her pajamas, not brushing her hair and eating irregularly (Tr. 113). While plaintiff reported "washing up" in the mornings, she also reported sometimes going up to four days without bathing (Tr. 112-13). She prepared her own meals approximately four times per week and was able to take her medication consistently (Tr. 114). She also took care of her two cats, feeding them and changing their litter (Tr. 113). She did not do other chores, handle her finances or go shopping (Tr. 114-15). She also reported that she did not spend time with people other than her family, but that she did not have any problems getting along with her family (Tr. 116-17). When she did leave her apartment, she did not go out alone, and she either took public transportation or walked (Tr. 115). Plaintiff slept only two to five hours per

night (Tr. 113) and reported difficulties with concentration, memory and completion of tasks, but she reported having no issues with instructions (Tr. 117). The report noted that plaintiff cried during the interview and that plaintiff said she was unable to control her crying (Tr. 118). Plaintiff also reported that she reacted to stress aggressively, by being irritable and crying (Tr. 118).

In a subsequent Function Report, dated about two months later (Tr. 143-51), plaintiff reported that she prepared her own meals once a week (Tr. 145) and only left the apartment for medical appointments (Tr. 146). Plaintiff reported that she needed to be reminded to take her medication (Tr. 145), that she spent all day in her pajamas, did not wash or bathe for days and sometimes weeks and did not brush her hair or shave her legs (Tr. 144-45). Plaintiff wrote that she watched television all day or sat and stared at the wall (Tr. 144). She reported that she did not read because she could not concentrate (Tr. 148), and that she did "not talk on the phone or wish to speak or see anyone" (Tr. 148).

C. Plaintiff's Medical Background

1. Dr. Rosario-Amaro and Bellevue and Harlem Hospitals

Dr. Francisco E. Rosario-Amaro saw plaintiff on June 15, 2010 (Tr. 178-80). He found that plaintiff was in a "[g]eneral[ly] good state of health[,] no weakness[,] no fatigue[,] no fever [and had] good exercise tolerance" (Tr. 178). At that time plaintiff stated that in the two weeks preceding the visit, she had not felt "down[,] depressed or hopeless," nor had she had "[l]ittle interest or pleasure in doing things" (Tr. 178). She also denied suicidal thoughts (Tr. 178). Plaintiff again denied suicidal thoughts when Dr. Rosario-Amaro saw her three months later on September 29, 2010, though at that time he referred her to a psychiatrist for treatment for depression (Tr. 180).

Plaintiff visited the Emergency Room at Bellevue Hospital on July 6, 2010 (Tr. 183). When interviewed by a physician, plaintiff admitted that she had told the triage nurse that she had suicidal ideations, but that they had passed (Tr. 183). She reported that she had received a referral to see a psychiatrist on an outpatient basis, but needed Medicaid to pay for the psychiatrist (Tr. 183). She explained that she believed

she could be approved for Medicaid more quickly "through the [E]mergency [R]oom" (Tr. 183). Plaintiff also stated that she had been unable to fill completely a prescription for Zoloft for financial reasons (Tr. 183). Plaintiff was given the telephone number of a suicide hotline and agreed to return to the Emergency Room "if she was feeling unsafe" (Tr. 183).

Plaintiff visited Harlem Hospital Center on September 3, 2010 (Tr. 189). The attending physician reported that plaintiff was "alert and oriented[ ]x3 [and] appropriately dressed," her "face was red because was crying," but she "denie[d] suicidal/homicidal ideation [and] auditory or visual hallucinations" (Tr. 189). Plaintiff did report "feeling depress[ed] and difficulty sleeping" (Tr. 189).

2. The FEGS[2] Reports

A FEGS report dated October 14, 2010 states that plaintiff was suffering from depression, PTSD, insomnia and "hands shaking," but that she had no current suicidal or homi-

[2]Federal Employment and Guidance Service ("FEGS") WeCare is a New York City program that "helps [public] assistance applicants and recipients with complex clinical barriers to employment, including medical, mental health, and substance abuse conditions, to obtain employment or federal disability benefits." FEGS: WeCare, FEGS Health & Human Servs., http://www.fegs.org/what-we-do/employment-workforce/jobseekers/wecare (last visited Oct. 29, 2014).

cidal ideations and no auditory or visual hallucinations (Tr. 193). The report notes that plaintiff formerly had auditory hallucinations but that they "resolved with medication [a] few mo[nths] ago" (Tr. 198). The report also lists Dr. Jolayemi as plaintiff's then current treating psychiatrist and indicates that plaintiff last saw Dr. Jolayemi "within [the] last month" (Tr. 193).

A FEGS report dated November 8, 2010 restates plaintiff's diagnosis of October 14, 2010 and states that plaintiff reported that she last had auditory and visual hallucinations ten months earlier (Tr. 201-03). The report also states that plaintiff reported that she had gone to Harlem Hospital and had seen Dr. Jolayemi (Tr. 204).

A FEGS report completed January 14, 2011 recommended "ssi and psych," stating that plaintiff's "clinical condition has not stabilized as per treating physician who does not expect improvement within the next 12 months" (Tr. 211).

3. Dr. Nuñez

Dr. Giovanny Nuñez, plaintiff's treating physician, completed a Psychiatric/Psychological Impairment Questionnaire on April 4, 2011 (Tr. 264-71). Dr. Nuñez indicated on this form that plaintiff's first date of treatment was November 30, 2010,

that the most recent exam was March 18, 2011 and that he had been seeing plaintiff on a monthly basis (Tr. 264). Dr. Nuñez diagnosed plaintiff with PTSD and severe major depressive disorder with psychotic features (Tr. 264). He indicated that plaintiff had poor memory, appetite disturbance with weight change, sleep and mood disturbance, psychomotor agitation or retardation, emotional lability,[3] anhedonia,[4] recurrent panic attacks, hostility and irritability, suicidal ideation or attempts, paranoia or inappropriate suspiciousness, delusions or hallucinations, perceptual disturbances, difficulty thinking or concentrating, persistent irrational fears, feelings of guilt or worthlessness, social withdrawal or isolation, decreased energy, persistent intrusive recollections of a traumatic experience and generalized persistent anxiety (Tr. 265). Dr. Nuñez wrote that the most consistent and severe symptoms were "depression, paranoid ideations, low energy, poor sleep" (Tr. 266).

Dr. Nuñez also indicated that plaintiff's symptoms resulted in marked limitations in five out of eight categories of Sustained Concentration and Persistence, and marked limitations

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[3]"Lability" is "emotional instability[,] rapidly changing emotions." Dorland's Illustrated Medical Dictionary, ("Dorland's") at 886 (27th ed. 1998).

[4]"Anhedonia" is "total loss of feeling of pleasure in acts that normally give pleasure." Dorland's at 89.

in plaintiff's ability to understand and remember detailed instructions (Tr. 267). Dr. Nuñez opined that plaintiff would have marked limitations in several other areas, including interactions with coworkers and superiors and an inability to travel to unfamiliar places or take public transportation (Tr. 268-69).

4. The Consultative Examiners

Dr. Marilee Mescon, an SSA consultative examiner, examined plaintiff on May 3, 2011 (Tr. 234-37). Dr. Mescon indicated that plaintiff reported having back pain for the past twenty years and that the pain radiates out to her right hip and down to her right knee and is worse when she stands (Tr. 234). Dr. Mescon reported that plaintiff had "no limitations in [her] ability to sit, stand, climb, push, pull, or carry heavy objects" (Tr. 237).

Dr. Michael Alexander, an SSA consultative examiner, also examined plaintiff on May 3, 2011. He reported that plaintiff stated she suffered from a hand tremor, stomach pain and breathing difficulties (Tr. 238). He also noted that plaintiff stated she had no homicidal or suicidal ideation and that plaintiff reported receiving treatment regularly from a psychiatrist and a therapist (Tr. 238). Plaintiff reported normal sleep and

appetite and exhibited no evidence of "panic or manic related symptoms" (Tr. 238). Dr. Alexander noted that plaintiff was "cooperative [and] friendly," and her concentration and memory were "intact" (Tr. 239).

Dr. Inman-Dundon, an SSA consultative psychologist, completed a psychiatric review form on May 31, 2011 (Tr. 242-55). Dr. Inman-Dundon checked only two boxes when reviewing plaintiff's condition, one indicating that plaintiff's condition did not constitute a severe impairment and one indicating that plaintiff's condition was an affective disorder (Tr. 242). There are no reasons listed for Dr. Inman-Dundon's conclusions, and there is no indication as to whether Dr. Inman-Dundon examined plaintiff or only looked at her records.

5. Dr. Jolayemi

Plaintiff submitted a Treating Physician Wellness Plan Report dated December 28, 2010 from Dr. Jolayemi to the Appeals Council (see Tr. 283-84). In this report, Dr. Jolayemi indicated that plaintiff had poor energy, poor memory, poor concentration, labile mood and poor frustration tolerance, and that these symptoms "severely limit [plaintiff's] functioning" (Tr. 284). Dr. Jolayemi also wrote that plaintiff had a history of panic attacks, flashbacks and auditory hallucinations (Tr. 283).

D. Proceedings Before the ALJ

Because plaintiff had income through July 2009, the ALJ amended plaintiff's alleged disability onset date to September 1, 2009 (Tr. 33-38).

Plaintiff testified that she suffers from auditory hallucinations (Tr. 35) and hand tremors (Tr. 40), and is unable to walk more than one block without "getting winded" (Tr. 41). In response to the ALJ's question about what her respiratory problem was "related to," plaintiff testified that it "was related to the fact that [she] can't -- because of [her] depression, [she] barely get[s] put of bed. [She] has so low energy [sic], so little motivation, that [she doesn't] leave [her] house unless [she has] to go to the doctor once a month" (Tr. 41). Plaintiff described her daily activities as sitting at home with the television on, but not watching it, and she stated that she is unable to concentrate (Tr. 42).

Plaintiff testified that she goes for treatment once a month and had been seeing Dr. Nuñez once a month since the beginning of 2011 (Tr. 42). She also stated that she takes Wellbutrin, Zoloft, Ambien and Abilify (Tr. 43). She testified that the medications have resolved her suicidal thoughts and

visual hallucinations but otherwise have not helped her depression (Tr. 43-44). She also testified that the medications give her muscle aches (Tr. 44). Finally, plaintiff testified that she does not spend time with anyone and does not answer the phone (Tr. 45).

III. Analysis

A. Applicable Legal Principles

1. Standard of Review

The Court may set aside the final decision of the Commissioner only if it is not supported by substantial evidence or if it is based upon an erroneous legal standard. 42 U.S.C. § 405(g); Selian v. Astrue, 708 F.3d 409, 417 (2d Cir. 2013) (per curiam); Talavera v. Astrue, 697 F.3d 145, 151 (2d Cir. 2012); Burgess v. Astrue, 537 F.3d 117, 127 (2d Cir. 2008).

The Court first reviews the Commissioner's decision for compliance with the correct legal standards; only then does it determine whether the Commissioner's conclusions were supported by substantial evidence. Tejada v. Apfel, 167 F.3d 770, 773 (2d Cir. 1999); Johnson v. Bowen, 817 F.2d 983, 985 (2d Cir. 1987). "Even if the Commissioner's decision is supported by substantial

evidence, legal error alone can be enough to overturn the ALJ's decision," Ellington v. Astrue, 641 F. Supp. 2d 322, 328 (S.D.N.Y. 2009) (Marrero, D.J.); accord Johnson v. Bowen, supra, 817 F.2d at 986, but "where application of the correct legal principles to the record could lead to only one conclusion, there is no need to require agency reconsideration," Johnson v. Bowen, supra, 817 F.2d at 986.

"'Substantial evidence' is 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Talavera v. Astrue, supra, 697 F.3d at 151, quoting Richardson v. Perales, 402 U.S. 389, 401 (1971). Consequently, "[e]ven where the administrative record may also adequately support contrary findings on particular issues, the ALJ's factual findings 'must be given conclusive effect' so long as they are supported by substantial evidence." Genier v. Astrue, 606 F.3d 46, 49 (2d Cir. 2010) (per curiam), quoting Schauer v. Schweiker, 675 F.2d 55, 57 (2d Cir. 1982). Thus, "[i]n determining whether the agency's findings were supported by substantial evidence, 'the reviewing court is required to examine the entire record, including contradictory evidence and evidence from which conflicting inferences can be drawn.'" Selian v. Astrue, supra, 708 F.3d at 417, quoting Mongeur v. Heckler, 722 F.2d 1033, 1038 (2d Cir. 1983) (per

curiam). Where, as here, the claimant has submitted new evidence to the Appeals Council following the ALJ's decision, such evidence becomes part of the administrative record. See Brown v. Apfel, 174 F.3d 59, 62 (2d Cir. 1999) (per curiam); Perez v. Chater, 77 F.3d 41, 45 (2d Cir. 1996).

2. Determination of Disability

A claimant is entitled to SSI and DIB benefits if she can establish an inability to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A); see also Barnhart v. Walton, 535 U.S. 212, 217-22 (2002) (both impairment and inability to work must last twelve months).[5] The impairment must be demonstrated by "medically acceptable clinical and laboratory diagnostic techniques," 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D), and it must be "of such severity" that the claimant cannot

[5]The standards that must be met to receive SSI benefits under Title XVI of the Act are the same as the standards that must be met in order to receive DIB benefits under Title II of the Act. Barnhart v. Thomas, 540 U.S. 20, 24 (2003). Accordingly, cases addressing the latter are equally applicable to cases involving the former.

perform her previous work and "cannot, considering [the claimant's] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Whether such work is actually available in the area where the claimant resides is immaterial. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

In making the disability determination, the Commissioner must consider: "(1) the objective medical facts; (2) diagnoses or medical opinions based on such facts; (3) subjective evidence of pain or disability testified to by the claimant or others; and (4) the claimant's educational background, age, and work experience." Brown v. Apfel, supra, 174 F.3d at 62; DiPalma v. Colvin, 951 F. Supp. 2d 555, 565 (S.D.N.Y. 2013) (Peck, M.J.).

The Commissioner must follow the five-step process required by the relevant regulations. 20 C.F.R. §§ 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). The first step is a determination of whether the claimant is engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520, 416.920(a)(4)(i). If she is not, the second step requires determining whether the claimant has a "severe medically determinable physical or mental impairment." 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If she does, the inquiry at the third step is whether any of

these impairments meet one of the listings in Appendix 1 of the regulations. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the answer to this inquiry is affirmative, the claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920(a)(4)(iii).

If the claimant does not meet any of the listings in Appendix 1, step four requires an assessment of the claimant's residual functional capacity ("RFC") and whether the claimant can still perform her past relevant work given her RFC. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv); see Barnhart v. Thomas, supra, 540 U.S. at 24-25. If she cannot, then the fifth step requires assessment of whether, given claimant's RFC, she can make an adjustment to other work. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). If she cannot, she will be found disabled. 20 C.F.R. §§ 404.1520, 416.920(a)(4)(v); see Selian v. Astrue, supra, 708 F.3d at 417-18; Talavera v. Astrue, supra, 697 F.3d at 151.

RFC is defined in the applicable regulations as "the most [the claimant] can still do despite [her] limitations." 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1). To determine RFC, the ALJ "identif[ies] the individual's functional limitations or restrictions and assess[es] his or her work-related abilities on a function-by-function basis, including the functions in para-

graphs (b),(c), and (d) of 20 [C.F.R. §§] 404.1545 and 416.945." Cichocki v. Astrue, 729 F.3d 172, 176 (2d Cir. 2013) (per curiam), quoting SSR 96-8p, 1996 WL 374184 at *1 (July 2, 1996). The results of this assessment determine the claimant's ability to perform the exertional demands of sustained work which may be categorized as sedentary, light, medium, heavy or very heavy. 20 C.F.R. §§ 404.1567, 416.967; see Rodriguez v. Apfel, 96 Civ. 8330 (JGK), 1998 WL 150981 at *7 n.7 (S.D.N.Y. Mar. 31, 1998) (Koeltl, D.J.). This ability may then be found to be further limited by non-exertional factors that restrict the claimant's ability to work. See Butts v. Barnhart, 388 F.3d 377, 383 (2d Cir. 2004), amended in part on other grounds on reh'g, 416 F.3d 101 (2d Cir. 2005); Bapp v. Bowen, 802 F.2d 601, 605-06 (2d Cir. 1986).

The claimant bears the initial burden of proving disability with respect to the first four steps. Selian v. Astrue, supra, 708 F.3d at 418; Burgess v. Astrue, supra, 537 F.3d at 128. Once the claimant has satisfied this burden, the burden shifts to the Commissioner to prove the final step -- that the claimant's RFC allows the claimant to perform some work other than her past work. Selian v. Astrue, supra, 708 F.3d at 418; Butts v. Barnhart, supra, 388 F.3d at 383.

In some cases, the Commissioner can rely exclusively on the Medical-Vocational Guidelines ("the Grid") contained in 20

C.F.R. Part 404, Subpart P, Appendix 2 when making the determination at the fifth step. Gray v. Chater, 903 F. Supp. 293, 297-98 (N.D.N.Y. 1995). "The Grid takes into account the claimant's RFC in conjunction with the claimant's age, education and work experience. Based on these factors, the Grid indicates whether the claimant can engage in any other substantial gainful work which exists in the national economy." Gray v. Chater, supra, 903 F. Supp. at 298; accord Butts v. Barnhart, supra, 388 F.3d at 383.

The Grid may not be relied upon exclusively in cases where the claimant has nonexertional limitations that significantly restrict her ability to work. Butts v. Barnhart, supra, 388 F.3d at 383; Bapp v. Bowen, supra, 802 F.2d at 605-06. When a claimant suffers from a non-exertional limitation such that she is "unable to perform the full range of employment indicated by the [Grid]," Bapp v. Bowen, supra, 802 F.2d at 603, or the Grid fails "to describe the full extent of a claimant's physical limitations," Butts v. Barnhart, supra, 388 F.3d at 383, the Commissioner must introduce the testimony of a vocational expert in order to prove "that jobs exist in the economy which claimant can obtain and perform." Butts v. Barnhart, supra, 388 F.3d at 384 (internal quotation marks and citation omitted); see also Heckler v. Campbell, 461 U.S. 458, 462 n.5 (1983) ("If an indi-

vidual's capabilities are not described accurately by a rule, the regulations make clear that the individual's particular limitations must be considered.").

B. The ALJ's Decision

As an initial matter, the ALJ found that plaintiff met the insured status requirements of the Act through December 31, 2012 (Tr. 14).

As noted above, the ALJ amended plaintiff's alleged disability onset date because she found that while plaintiff had initially alleged a disability onset date of January 1, 2009, plaintiff had earned almost $2,000 per month through July 2009 (Tr. 14). Plaintiff agreed to amend the disability onset date to September 1, 2009, and the ALJ found at the first step of the disability analysis that plaintiff had not engaged in substantial gainful activity since that date (Tr. 14).

At step two, the ALJ found that plaintiff did have a severe impairment, namely major depression with psychotic features (Tr. 15). The ALJ found that this impairment existed for more than twelve months based on plaintiff's testimony at the hearing (Tr. 15). The ALJ found no evidence of a medically determinable physical impairment, concluding that plaintiff's

"alleged physical symptoms are attributable to her depressive disorder" (Tr. 15).

At step three, the ALJ found that the plaintiff's impairment, though severe, did not meet or medically equal the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (Tr. 15). The plaintiff had "no restrictions on activities of daily living, moderate difficulties maintaining social functioning and moderate difficulties maintaining concentration, persistence or pace. There have been no episodes of decompensation" (Tr. 16). The ALJ therefore found that plaintiff did not evidence at least two of the listed criteria, and, thus, plaintiff's impairment was not at listing level (Tr. 16).

At step four, the ALJ assessed plaintiff's credibility, finding that her "allegations are not fully supported by the medical record" (Tr. 16). Specifically she identified discrepancies in plaintiff's description of her symptoms. The ALJ found that some of plaintiff's claimed symptoms -- suicidal thoughts, shaky hands, insomnia, decreased concentration and memory, anhedonia and auditory hallucinations -- were contradicted by the evidence (see Tr. 16-17). For example, at the hearing plaintiff testified that she still experienced auditory hallucinations "almost every day sometimes" (Tr. 35). However, plaintiff had consistently told other treating and consulting sources that

although she had previously had auditory hallucinations, that condition had responded to treatment and was resolved by the summer of 2010 -- one year before the hearing (Tr. 17). In addition, the ALJ noted that plaintiff denied any suicidal ideations (Tr. 17).

The ALJ accorded the opinion of plaintiff's treating physician Dr. Nuñez "limited weight" because the ALJ found his opinion to be "extremely restrictive and inconsistent with the observations and opinions by the other examining medical sources of record [and it could not] be corroborated or substantiated by clinical observations and findings" (Tr. 18). The ALJ noted that Dr. Nuñez provided treatment from November 30, 2010 through March 18, 2011, and the ALJ found credible the symptoms that Dr. Nuñez reported (Tr. 18). Nevertheless, the ALJ found that the functional limitations that Dr. Nuñez claimed resulted from those symptoms were "not consistent with the rest of the evidence of record" (Tr. 18). The ALJ noted that the "one incongruent report [in plaintiff's medical records] is the treatment report by Dr. Nuñez" (Tr. 19).

The ALJ accorded Dr. Alexander, a consultative psychologist, "[g]reat weight" because "he substantiated his opinions with extensive clinical findings" and because his opinions were consistent with the record as a whole (Tr. 19).

The ALJ then found that plaintiff "retain[ed] the residual functional capacity to perform the exertional demands of sedentary work" (Tr. 19). The ALJ found plaintiff lacked the capacity to perform her past relevant work, which was skilled sedentary work at the medium exertional level (Tr. 19). Given her restriction to two to three step instructions and occasional contact with coworkers, the ALJ found that plaintiff could perform only unskilled work (Tr. 19).

At step five, the ALJ did not assess the transferability of plaintiff's job skills because the Grid would direct a finding of "not disabled" whether or not plaintiff's skills were transferable (Tr. 20). The ALJ found that plaintiff could perform work that existed in significant numbers in the national economy because she could perform unskilled sedentary work (Tr. 20).

> If the claimant had the residual functional capacity to perform the full range of sedentary work, considering the claimant's age, education, and work experience, a finding of 'not disabled' would be directed by the Medical-Vocational Rule 201.28. However, the additional limitations have little or no effect on the occupational base of unskilled sedentary work. A finding of 'not disabled' is therefore appropriate under the framework of Medical-Vocational Rule 201.28. The claimant's concentration and memory limitations restrict her to an unskilled occupational base. Her limitation to only occasional contact with coworkers does not significantly affect the unskilled occupational base. The claimant's additional limitations have only a slight effect on the unskilled sedentary

> occupational base. A decision under the framework of Medical-Vocational Rule 201.28 is appropriate (SSR 85-15)

(Tr. 20). The ALJ therefore found plaintiff not disabled (Tr. 20).

C. Analysis of the ALJ's Decision

Plaintiff argues that the ALJ committed legal error by failing to develop the record with respect to Dr. Nuñez and Dr. Jolayemi and by failing to obtain a vocational expert at the fifth step of the disability analysis (Memorandum of Law in Support of Plaintiff's Cross-Motion for Judgment on the Pleadings, dated March 10, 2014 (Docket Item 23) ("Pl.'s Mem.") at 14, 16, 18).

1. Duty to Develop the Record

Plaintiff argues that the ALJ did not fulfill her duty to develop the record because she should have requested treatment notes from Dr. Nuñez and Dr. Jolayemi, because the ALJ knew that both were plaintiff's treating physicians (Pl.'s Mem. at 14, 18).

The ALJ has "an affirmative obligation to fully develop the administrative record." Calzada v. Astrue, 753 F. Supp. 2d 250, 269 (S.D.N.Y. 2010) (Sullivan, D.J.) (adopting Report &

Recommendation); accord Perez v. Chater, supra, 77 F.3d at 47. "The non-adversarial nature of a Social Security hearing requires the ALJ 'to investigate the facts and develop the arguments both for and against granting benefits.'" Devora v. Barnhart, 205 F. Supp. 2d 164, 172 (S.D.N.Y. 2002) (Gorenstein, M.J.), quoting Sims v. Apfel, 530 U.S. 103, 111 (2000). This duty is even more important when the information concerns a claimant's treating source. See Devora v. Barnhart, supra, 205 F. Supp. 2d at 172-73.

> [A]n ALJ cannot reject a treating physician's diagnosis without first attempting to fill any clear gaps in the administrative record. See Schaal, 134 F.3d at 505 ("[E]ven if the clinical findings were inadequate, it was the ALJ's duty to seek additional information from [the treating physician] sua sponte."); see also Hartnett v. Apfel, 21 F. Supp. 2d 217, 221 (E.D.N.Y. 1998) ("[I]f an ALJ perceives inconsistencies in a treating physician's reports, the ALJ bears an affirmative duty to seek out more information from the treating physician and to develop the administrative record accordingly.").

Rosa v. Callahan, 168 F.3d 72, 79 (2d Cir. 1999); accord Butts v. Barnhart, supra, 388 F.3d at 386; Rivera v. Comm'r of Soc. Sec., 728 F. Supp. 2d 297, 322 (S.D.N.Y. 2010) (Sullivan, D.J.).

The ALJ must "seek additional evidence or clarification when the 'report from [the] claimant's medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be

based on medically acceptable clinical and laboratory diagnostic techniques.'" Calzada v. Astrue, supra, 753 F. Supp. 2d at 269, quoting 20 C.F.R. §§ 404.1512(e)(1), 416.912(e)(1)(2011)[6]; accord Norman v. Astrue, 912 F. Supp. 2d 33, 42 (S.D.N.Y. 2012) (Carter, D.J.); see Rosa v. Calahan, supra, 168 F.3d at 79; Clark v. Comm'r of Soc. Sec., 143 F.3d 115, 118 (2d Cir. 1998).

The regulations state that "'[w]hen the evidence we receive from your treating physician . . . or other medical source is inadequate for us to determine whether you are disabled, . . . [w]e will first recontact your treating physician . . . or other medical source to determine whether the additional information we need is readily available.'" Perez v. Chater, supra, 77 F.3d at 47 (alterations in original), quoting 20 C.F.R. §§ 404.1512(e), 416.912(e)(2011). The applicable regulations state that the ALJ must "make every reasonable effort to help [a claimant] get medical reports from [her] own medical sources." 20 C.F.R. §§ 404.1512(d), 416.912(d). Where, as here, a claimant

[6]The Commissioner amended these regulations on March 26, 2012 to remove former paragraph (e) and the duty it imposed on ALJs to re-contact a disability claimant's treating physician under certain circumstances. How We Collect and Consider Evidence of Disability, 77 Fed. Reg. 10651, 10651 (Feb. 23, 2012) (codified at 20 C.F.R. pts. 404, 416). The earlier versions of Sections 404.1512(e) and 416.912(e) quoted here were in effect when ALJ Reich adjudicated plaintiff's DIB and SSI claims, and, therefore, they apply here. Lowry v. Astrue, 474 F. App'x 801, 804 n.2 (2d Cir. 2012).

appeared pro se,[7] this obligation is heightened. Cruz v. Sullivan, 912 F.2d 8, 11 (2d Cir. 1990), citing Echevarria v. Sec'y of Health & Human Servs., 685 F.2d 751, 755 (2d Cir. 1982); Jones v. Apfel, 66 F. Supp. 2d 518, 523 (S.D.N.Y. 1999) (Pauley, D.J.).

a. Dr. Nuñez

Plaintiff argues that the ALJ did not fulfill her duty to develop the record because she should have requested treatment notes from Dr. Nuñez (Pl.'s Mem. at 14). Plaintiff contends that the lack of records from Dr. Nuñez created a critical gap in the record because there were no treatment records from plaintiff's treating psychiatrist for the entire year preceding the hearing date (Pl.'s Mem. at 18).

The Commissioner responds that the ALJ satisfied her duty to develop the record with respect to Dr. Nuñez, as the record contained "ample evidence" of plaintiff's condition (Reply Memorandum of Law in Further Support of the Commissioner's Motion for Judgment on the Pleadings and in Opposition to Plaintiff's

[7]While plaintiff is represented by counsel at this stage of her appeals process, she appeared pro se until after the filing of her complaint in this Court.

Cross-Motion for Judgment on the Pleadings, dated April 10, 2014 (Docket Item 21) ("Comm'r Reply") at 6).

The ALJ's failure to obtain further records from Dr. Nuñez is problematic here because he was a significant treating source, the balance of the medical record is sparse and the absence of supporting documentation was one of the critical reasons given by the ALJ for discounting Dr. Nuñez's opinion.

Plaintiff began receiving treatment from Dr. Nuñez at the end of November 2010, and thereafter saw him on a monthly basis through the date of the hearing on January 3, 2012. The only evidence from Dr. Nuñez in the record is the questionnaire dated April 4, 2011. Aside from the fact that no supporting treatment notes were submitted, the date of the questionnaire means that it covers only four months of plaintiff's treatment and leaves a nine-month gap in the treatment record. The only other evidence in the record, apart from the report by Dr. Jolayemi submitted to the Appeals Council after the ALJ's decision, that covers the time plaintiff was in treatment with Dr. Nuñez are the reports from the SSA consultative examiners who saw plaintiff a single time in May 2011, the FEGS Function Reports

prepared by non-physicians and a FEGS Wellness Summary that relied on the opinion of plaintiff's treating physician.[8]

The record does not indicate whether the ALJ sought additional documents from Dr. Nuñez. It was incumbent upon the ALJ to obtain the treatment notes or to re-contact Dr. Nuñez regarding the conclusions in his questionnaire and his treatment of plaintiff during the remainder of the relevant time period before rejecting his opinion as insufficiently supported and inconsistent with the majority of the evidence. Rosado v. Barnhart, 290 F. Supp. 2d 431, 440 (S.D.N.Y. 2003) (Marrero, D.J.) ("The ALJ cannot rely on the absence of evidence, and is thus under an affirmative duty to fill any gaps in the record.") (emphasis in original); see Rosa v. Callahan, supra, 168 F.2d at 79. This is particularly true when the missing documents relate to a treating source. See Echevarria v. Sec'y of Health & Human Servs., supra, 685 F.2d at 756 ("[T]he proper course would have been to direct [plaintiff] to obtain a more detailed statement

[8]While I review the ALJ's decision here only for legal error, I note that the ALJ's failure to obtain documentation (other than a single report covering four months out of over two years of alleged disability) from the only physician who treated plaintiff for a substantial period of time makes it difficult to understand how the ALJ's decision could be supported by substantial evidence, especially given that plaintiff's application for disability is premised entirely on limitations caused by psychological disorders.

from the treating physicians."); Cleveland v. Apfel, 99 F. Supp. 2d 374, 380 (S.D.N.Y. 2000) (Scheindlin, D.J.) ("The Social Security regulations give special evidentiary weight to the opinion of a treating physician when diagnosing the nature and severity of a plaintiff's condition."), citing Clark v. Comm'r of Soc. Sec., supra, 143 F.3d at 118.

The ALJ's unexplained failure to seek additional records from Dr. Nuñez warrants the remand of this matter. See Pratts v. Chater, 94 F.3d 34, 39 (2d Cir. 1996) ("When there are gaps in the administrative record . . . , we have, on numerous occasions, remanded to the [Commissioner] for further development of the evidence.").

b. Dr. Jolayemi

Plaintiff next contends that the ALJ erred by failing to request documentation regarding Dr. Jolayemi's treatment of plaintiff given that plaintiff identified Dr. Jolayemi as a treating physician (Pl.'s Mem. at 18). The Commissioner responds that the restrictive limitations described by Dr. Jolayemi are inconsistent with the record and of "limited value" because the record shows plaintiff's condition improved at the beginning of 2011 (Comm'r Reply at 6).

The record is not clear as to Dr. Jolayemi's role in plaintiff's treatment, and the ALJ should have attempted to obtain clarification. Although plaintiff identified Dr. Jolayemi as a treating source in her application for benefits (Tr. 168), plaintiff claimed in that application that she saw Dr. Jolayemi only in December 2010 (Tr. 168). The application, submitted in February 2011, stated that plaintiff had scheduled no further appointments with Dr. Jolayemi (Tr. 168).

Nevertheless, the ALJ should have explored whether additional records could have been obtained from Dr. Jolayemi, given plaintiff's identification of Dr. Jolayemi as a treating source in her FEGS reports of October 14, 2010 and November 8, 2010. The October 14, 2010 report also states that plaintiff had seen Dr. Jolayemi within the preceding month. These dates are inconsistent with the statements in plaintiff's application for benefits. The record of treatment with Dr. Jolayemi is further confused by plaintiff's identification of Dr. Jolayemi as a prescribing physician in December 2011 (Tr. 171). The ALJ did not explore or try to resolve these inconsistencies. Considering the importance of opinions from treating physicians in the determination of disability and the significant gaps in plaintiff's medical record, the ALJ should have requested further information from Dr. Jolayemi. This defect has not been cured by

the submission of a Treating Physician Report from Dr. Jolayemi to the Appeals Council (Tr. 283-84). That report is dated December 28, 2010 and fails to clarify the length or frequency of the treatment relationship.

Thus, the ALJ's failure to develop the record with respect to Dr. Jolayemi also warrants remanding this matter.

2. Vocational Expert

Plaintiff's last contention is that, given plaintiff's nonexertional limitations, the ALJ should have secured testimony from a vocational expert to determine whether plaintiff could perform other work available in the national economy (Pl.'s Mem. at 16). The Commissioner responds that a vocational expert was unnecessary because the ALJ found that plaintiff's restrictions had only a slight impact on her occupational base of unskilled sedentary work and that as a result, the ALJ's use of the Grid was appropriate (Memorandum of Law in Support of the Commissioner's Motion for Judgment on the Pleadings, dated December 6, 2013 (Docket Item 13) at 24).

"[T]he 'mere existence of a nonexertional impairment does not automatically . . . preclude reliance on the [Grid].'" Zabala v. Astrue, 595 F.3d 402, 410-11 (2d Cir. 2010) (second

alteration in original), quoting Bapp v. Bowen, supra, 802 F.2d at 603. However, if the nonexertional impairment has more than negligible impact on plaintiff's employment opportunities, a vocational expert is necessary.

> We have explained that the ALJ cannot rely on the Grids if a non-exertional impairment has any more than a "negligible" impact on a claimant's ability to perform the full range of work, and instead must obtain the testimony of a vocational expert. See Zabala v. Astrue, 595 F.3d 402, 411 (2d Cir. 2010); see also Saiz v. Barnhart, 392 F.3d 397, 400 (10th Cir. 2004) (per curiam). A nonexertional impairment is non-negligible "when it . . . so narrows a claimant's possible range of work as to deprive him of a meaningful employment opportunity." Zabala, 595 F.3d at 411 (internal quotations marks omitted).

Selian v. Astrue, supra, 708 F.3d at 421 (alteration in original); accord Bapp v. Bowen, supra, 802 F.2d at 605 ("[W]e hold that application of the grid guidelines and the necessity for expert testimony must be determined on a case-by-case basis."); Hillard v. Colvin, 13 Civ. 1942 (AJP), 2013 WL 5863546 at *17 (S.D.N.Y. Oct. 31, 2013) (Peck, M.J.). Plaintiff's depression and inability to follow detailed instructions are plainly non-exertional limitations. See 20 C.F.R. §§ 404.1569a(c), 416.969a(c).

> Unlike determining a disability where the claimant has an exertional impairment, the rules do not direct factual conclusions of disabled or not disabled for individuals with solely nonexertional types of impairments. In the evaluation of disability where the individual has solely a nonexertional type of impair-

> ment, determination as to whether disability exists shall be based on the principles in the appropriate sections of the regulations, giving consideration to the rules for specific case situations.

Jehn v. Barnhart, 408 F. Supp. 2d 127, 134-35 (E.D.N.Y. 2006) (citations, quotation marks and alteration omitted), quoting 20 C.F.R. pt. 404, subpt. P, app. 2, Rule 200.00(e)(1); see also SSR 85-15, 1985 WL 56857 at *3-*4 (Jan. 1, 1985) (describing use of the Grid for assessing solely nonexertional limitations and noting that use of a vocational expert is not necessarily required).

Here the ALJ did consider whether plaintiff's occupational base was narrowed significantly by her nonexertional limitations. At step five of the disability analysis, the ALJ found that plaintiff's impairments limited her to unskilled sedentary work (Tr. 20). The ALJ then considered whether and to what degree plaintiff's impairments would further limit her occupational base (Tr. 20).

> If the claimant had the residual functional capacity to perform the full range of sedentary work, considering the claimant's age, education, and work experience, a finding of 'not disabled' would be directed by the Medical-Vocational Rule 201.28. However, the additional limitations have little or no effect on the occupational base of unskilled sedentary work. A finding of 'not disabled' is therefore appropriate under the framework of Medical-Vocational Rule 201.28. The claimant's concentration and memory limitations restrict her to an unskilled occupational base. Her limitation to only occasional contact with coworkers

> does not significantly affect the unskilled occupational base. The claimant's additional limitations have only a slight effect on the unskilled sedentary occupational base. A decision under the framework of Medical-Vocational Rule 201.28 is appropriate (SSR 85-15)

(Tr. 20). The ALJ found that he could rely on the Grid in this situation because plaintiff's nonexertional limitations did not significantly restrict her occupational base of unskilled sedentary work. See Bapp v. Bowen, supra, 802 F.2d at 605 ("If the guidelines adequately reflect a claimant's condition, then their use to determine disability status is appropriate."). The ALJ's use of Rule 201.28 also took into account plaintiff's age, education and ability to communicate in English. See SSR 85-15, supra, at *3 ("[The] issue is whether the person can be expected to make a vocational adjustment considering the interaction of his or her remaining occupational base with his or her age, education, and work experience.").

Because the ALJ analyzed whether plaintiff's impairments had only a negligible impact on plaintiff's unskilled sedentary occupational base and found that they did, he did not commit legal error by relying on the Grid in making his determination and not obtaining the testimony of a vocational expert. See Selian v. Astrue, supra, 708 F.3d at 422 (remanding for ALJ to determine whether plaintiff's nonexertional limitations were

negligible); Zabala v. Astrue, supra, 595 F.3d at 411; Cornell v. Colvin, 12 Civ. 1127 (JTC), 2014 WL 1572342 at *9 (W.D.N.Y. Apr. 18, 2014); Howe v. Colvin, 12 Civ. 6955 (JPO)(SN), 2013 WL 4534940 at *18 (S.D.N.Y. Aug. 27, 2013) (Oetken, D.J.) (adopting Report & Recommendation) (finding ALJ did not commit legal error when using the Grid as a framework and finding plaintiff's nonexertional limitations had "little or no effect on the occupational base of unskilled sedentary work").

Whether the ALJ's decision not to use a vocational expert was appropriate given the evidence in the record is a separate question and need not be addressed here, since "[o]nly after finding that the correct legal standards were applied should the Court consider the substantiality of the evidence." Calabrese v. Astrue, 592 F. Supp. 2d 379, 385 (W.D.N.Y. 2009), aff'd, 358 F. App'x 274 (2d Cir. 2009) (summary order), quoting Johnson v. Bowen, supra, 817 F.2d at 985; see also Schaal v. Apfel, supra, 134 F.3d at 504 ("'Where there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles.'" (quoting Johnson v. Bowen, supra, 817 F.2d at 986)).

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that the Commissioner's motion for judgment on the pleadings be denied and plaintiff's cross-motion for judgment on the pleadings be granted to the extent of remanding this matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) for further proceedings consistent with this report and recommendation.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6(a). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Edgardo Ramos, United States District Judge, 40 Foley Square, Room 410, and to the Chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Ramos. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT

IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983) (per curiam).

Dated: New York, New York
November 17, 2014

Respectfully submitted,

HENRY PITMAN
United States Magistrate Judge

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